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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Reexamination of the Comparative Standards)
For Noncommercial Educational Applicants)

MM Docket No. 95-31

To: The Commission

COMMENTS

Thomas M. Eells ("Commenter"), pursuant to Section 1.415 of the Commission's Rules and the Commission's *Second Further Notice of Proposed Rulemaking*, MM Docket No. 95-31, FCC 02-44 (released February 25, 2002) ("2nd FNPRM"), hereby submits his Comments regarding the revised procedures proposed for licensing non-reserved FM radio channels where non-commercial educational ("NCE") entities are among the mutually exclusive applicants.¹ In support hereof, the following is respectfully shown:

Background

This proceeding arose out of a 1997 amendment to the Communications Act ("the Act") directing the Commission to use auctions to process mutually exclusive applications for initial broadcast licenses, but exempting NCE stations from auction processes.² Because both commercial entities (subject to auctions) and NCE entities (not subject to auctions) presently are eligible to apply for the portion of the FM band that is not reserved exclusively for NCE

¹ The Commenter is a former radio station owner. He also formerly worked as Director of Educational and Religious Programming for a Midwest radio station. He is a prospective applicant to construct new FM stations on non-reserved channels. Therefore the Commenter is an "interested person" under Rule Section 1.415(a).

² See 47 U.S.C. §309(j)(1)-(3).

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entities³, there is an issue as to how mutual exclusivity between commercial and NCE applicants should be resolved. Previously, the Commission adopted rules that would have exempted NCE entities from auctions only with respect to reserved channels, and would not have exempted NCE applications for non-reserved channels where mutually exclusive with commercial applications⁴. The United States Court of Appeals for the District of Columbia Circuit vacated that approach, holding that Section 309(j)(2) of the Act prohibits the Commission from requiring NCE entities to participate in auctions, regardless of whether the channel sought is reserved or non-reserved⁵.

In the 2nd *FNPRM*, the Commission has now proposed the following options for licensing non-reserved channels in a manner consistent with Section 309(j)(2):

- Option #1: Hold NCE entities ineligible for licenses for non-reserved channels;
- Option #2: Allow NCE entities to acquire non-reserved spectrum licenses only when no commercial entities apply; or
- Option #3: Allow NCE entities to reserve additional spectrum outside the reserved band.

For the reasons stated below, the Commenter respectfully urges the Commission to adopt Option #1.

Comments on Option #1: Restrict eligibility for initial licensing on non-reserved channels.

The Commenter respectfully notes that the Commission's responsibility and purpose in this proceeding is not "to ensure that NCE entities have reasonable opportunities to obtain the

³ The FM channels between 88.1 MHz and 91.9 MHz are reserved exclusively for NCE use, as are other FM channels reserved for NCE use through the allotment process. NCE entities also are currently eligible to apply for non-reserved FM channels.

⁴ *Report and Order*, "Reexamination of the Comparative Standards for Noncommercial Educational Applicants," 15 FCC Rcd 7386 at ¶119 (2000).

⁵ *National Public Radio v FCC*, 254 F.3d 226 (D.C. Cir. 2001) ("*NPR*").

spectrum they need,” as the Commission appears to suggest in paragraph 19, but rather, to formulate licensing procedures that will further the public interest, convenience, and necessity.

The statutory “public interest, convenience, and necessity” standard, rather than accommodation of the purely private needs of a specific class of applicants, has long governed the Commission’s licensing processes.⁶ Building upon that long-standing licensing standard, Section 309(j)(3) of the Act expressly directs the Commission to “protect the public interest in the use of the spectrum” in designing standards for auctioning spectrum.⁷

The key question in this proceeding therefore is what procedure would best serve the public interest in the licensing of the non-reserved channels. The Commenter agrees with the Commission that “a decision to hold NCE entities completely ineligible for non-reserved channels has the advantage of clarity and simplicity.”⁸ Exclusion of NCE applications for non-reserved channels would thus further the statutory goal of rapid and efficient introduction of new radio service.⁹

In some cases, mutual exclusivity between NCE and commercial applicants for non-reserved FM channels has delayed introduction of new FM services for years. As of February 14, 2002, there were 31 groups of mutually exclusive commercial and NCE applicants (“mixed groups”) for non-reserved channels.¹⁰ Some of the applications in those mixed groups have been

⁶ See generally Sections 307(a) (“The Commission, if public convenience, interest, or necessity will be served thereby ... shall grant to any applicant therefore a station license provided for by this Act” and 308(a) (“...the Commission shall determine ... whether the public interest, convenience and necessity will be served by the granting of such application.”).

⁷ 47 U.S.C. §309(j)(3).

⁸ 2nd FNPRM at ¶12.

⁹ 47 U.S.C. §151.

¹⁰ 2nd FNPRM at note 40.

pending for as long as a decade.¹¹ In addition, in September 2000, the Commission announced that construction permits for 355 non-reserved FM channels would be offered in Auction No. 37.¹² Due to the lack of procedures for selecting licenses from mixed groups, Auction No. 37 has been repeatedly postponed.¹³ If the Commission declares NCE applicants ineligible for non-reserved FM channels, the long-pending applications can proceed to auction, and Auction No. 37 can be rescheduled.

There is no question that it is within the Commission's authority to declare NCE entities to be ineligible to apply for non-reserved channels. The Commission's authority to establish eligibility standards in the auction context is set forth expressly in Section 309(j)(3) of the Act.¹⁴ Section 309(j)(3) accords the Commission authority to "...[specify] eligibility and other characteristics of such licenses and permits" in designing auction procedures. The Commission's authority to establish eligibility standards also exists generally in its licensing authority under Section 308(b)¹⁵ and its rule making authority under Section 303(r).¹⁶ The Courts, including the Supreme Court of the United States, have long upheld the Commission's authority to limit the eligibility of certain categories of applicants.¹⁷ Indeed, the Courts have

¹¹ For example, the mutually exclusive commercial and NCE applications for FM Channel 225A in Southampton, New York, have been pending since September 1992.

¹² *FCC Public Notice*, DA 00-2171, dated September 25, 2000.

¹³ See *FCC Public Notice*, DA 01-2148, dated September 14, 2001 and *FCC Public Notice*, DA 01-619, dated March 7, 2001.

¹⁴ 47 U.S.C. §309(j)(3).

¹⁵ "All applications for station licenses ... shall set forth such facts as the Commission by regulation may prescribe as to the ... qualifications of the applicant." 47 U.S.C. §308(b).

¹⁶ "[T]he Commission from time to time, as public convenience, interest, or necessity requires shall –

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act ..."

47 U.S.C. §303(r).

¹⁷ *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (broadcast-

held that the Commission has authority to exclude certain categories of potential applicants from eligibility even after the applications were filed and achieved “cut-off” status.¹⁸

NCE entities have other opportunities outside the non-reserved spectrum to establish new FM stations, including:

- New NCE FM stations on reserved band channels. The twenty-one FM channels between 88.1 MHz and 91.9 MHz are reserved *exclusively* for NCE use.¹⁹ Since an FM signal does not pose interference to every fourth channel, in most areas these twenty-one reserved band channels can provide for a minimum of five channels at any geographic point. Actually, many more NCE reserved channels are possible when the special procedures applicable to Class D stations²⁰ and Channels 221-223²¹ are considered. For example, in the Los Angeles Metropolitan area, within a fifty mile radius of the leading NPR station, KCRW, there are *10* full power NCE FM stations plus *30* Class D stations.

- Reservation of new allotments for NCE FM stations. NCE entities may request reservation of otherwise non-reserved FM channels for NCE use by requesting amendment of the FM allotment table. The Commission has long allowed such reservations where TV Channel 6 operations or foreign treaties precluded reserved band operation. Recently, the Commission expanded the circumstances in which NCE entities may reserve otherwise non-reserved FM channels to also consider demonstrations of “need.”²²

newspaper cross ownership prohibition); *U.S. v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (multiple ownership limitation); *NBC v. U.S.*, 319 U.S. 190 (1943) (duopoly prohibition).

¹⁸ *Hispanic Information & Telecommunications Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir., 1989) (ITFS absolute local preference).

¹⁹ 47 C.F.R. §73.501.

²⁰ Rule Section 73.512.

²¹ Rule Section 73.507(a).

²² *Report and Order*, “Reexamination of the Comparative Standards for Noncommercial

- Low power FM. The Commission recently created a low power FM radio service as an *exclusively* noncommercial service, with the potential for hundreds of new non-commercial stations.²³ A stated basis for limiting LPFM participation to NCE entities was to “meet needs unmet by the commercial radio service.”²⁴

The Commenter also respectfully notes that NCE stations now comprise more than one-fourth of all existing full-power FM stations. The FCC recently announced that 2,234 of the total 8,285 FM stations are NCE stations.²⁵ Although many of these stations operate in the reserved band, many other NCE stations are operating on non-reserved channels.

The Commission has expressed concern that Option #1 would be “a departure from current policy.”²⁶ However, a departure from prior policy is a reasonable administrative response to changed circumstances in the broadcast industry.²⁷ The Commenter respectfully submits that the new licensing landscape opened by the extension of the Commission’s auction authority to the licensing of most broadcast stations justifies and warrants the proposed policy change.

Educational Applications,” 15 FCC Rcd 7396 at ¶114 ((2000) (“*R&O*”).

²³ *Report and Order*, “Creation of Low Power Radio Service,” 15 FCC Rcd 2205, *aff’d*, 15 FCC Rcd 19208 (2000).

²⁴ *Id.* at para. 198.

²⁵ *FCC News Release*, “Broadcast Station Totals as of September 30, 2001,” dated October 30, 2001.

²⁶ 2nd FNPRM at ¶11.

²⁷ *FCC v. National Citizens Committee for Broadcasting*, *supra*.

Comments on Option #2: Permitting NCE entities to acquire non-reserved channel licenses in the absence of commercial applications.

The Commission has expressed concern that declaring NCE entities ineligible to apply for non-reserved channels might preclude NCE entities from applying for non-reserved channels even when no commercial entities do so.²⁸ However, as noted *infra*, NCE entities have the right to request reservation of otherwise non-reserved FM channels. In the event no commercial entity applies for a non-reserved channel during a specified filing window, an NCE entity interested in the channel can propose to amend the FM allotment table to reserve the channel for NCE use.

The Commission's proposal to open filing windows for non-reserved spectrum to NCE as well as commercial applicants -- but then to declare NCE applicants ineligible on channels for which commercial entities also applied -- would needlessly waste public and private resources as well as create massive uncertainty among applicants. Applicants should be entitled to know whether they are eligible to apply for a channel before filing. It would be contrary to the public interest for the Commission to require NCE applicants to tap scarce resources to prepare possibly futile filings. Furthermore, the Commission's staff would be burdened with sifting through the applications to weed out stacks of ineligible. Legal challenges to returns would be likely. The ultimate result would likely be to delay, not expedite, new radio service on the non-reserved channels.

Comments on Option #3: Permitting NCE entities additional opportunities to reserve channels.

NCE entities already have the right to seek to reserve otherwise non-reserved FM channels for NCE use, and, as noted *infra*, the reservation criteria have recently been relaxed.

²⁸ 2nd FNRPM at ¶12.

The Commission asks whether the reservation criteria should be further relaxed to accord NCE entities that the *NPR* decision foreclosed from bidding on non-reserved channels a further opportunity to reserve those channels.²⁹ The Commission also notes that many of the channels scheduled for Auction No. 37 were allocated prior to adopting the relaxed reservation criteria and asks whether NCE entities should now be given the opportunity to request reservation of those channels.

In the case of each non-reserved FM allotment, NCE entities have already had the opportunity in notice and comment rule making proceedings to present facts warranting reservation of the channel for NCE use. Any missed opportunities have resulted from the ostensibly interested NCE entities sitting on their rights. Resolution of the long-pending applications in the presently mixed groups, and the opening of Auction No. 37, should not be further delayed to afford the NCE entities a second bite at the apple.

Conclusion

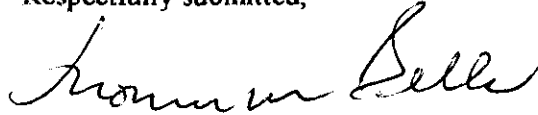
In sum, the Commenter submits that the fairest and most expeditious way to resolve the licensing issue posed when both commercial and NCE entities apply for non-reserved FM channels is to declare NCE entities ineligible for non-reserved FM channels. NCE entities have exclusive access to other spectrum in the FM band, and also have the right to request reservation of non-reserved channels upon a proper showing of need.

The licensing of non-reserved FM channels for which conflicting NCE and commercial applications are pending has already been delayed for up to ten years. The auction of an

²⁹ 2nd FNPRM at ¶16.

additional 355 non-reserved FM channels in Auction No. 37 has been repeatedly postponed. Declaring NCE entities ineligible for these channels is within the Commission's authority, and will allow auction of these channels to move forward, and introduction of new radio service on these channels in the public interest.

Respectfully submitted,



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